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State v. Key Appellant's Reply Brief Dckt. 35955

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 35955
)	
v.)	
)	
GINGER J. KEY,)	REPLY BRIEF
)	
Defendant-Appellant.)	

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF IDAHO

HONORABLE JEFF M. BRUDIE
District Judge

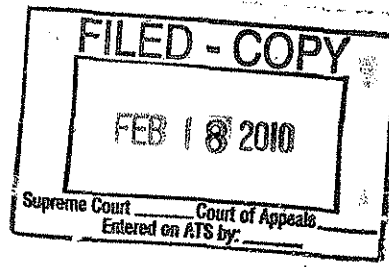
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STATEMENT OF THE CASE

Nature of the Case

Ginger Key has challenged on appeal several aspects of the criminal forfeiture order entered against her. This Reply Brief is necessary to clarify the specific nature of her arguments on appeal, as opposed to the characterizations of these arguments in the State's Respondents Brief, as well as to provide further clarification of the applicable law governing these issues.

Specifically, this brief is necessary to first clarify that Ms. Key's arguments regarding the violation of her right to a jury trial are allegations of a fundamental with regard to violations of her important and fundamental constitutional rights. While there may be attendant issues of the constitutionality of statutory provisions purporting to eliminate these rights, any issue regarding the constitutionality of the statute is collateral to, and pendant upon, her claims of fundamental error.

In addition, the State's arguments regarding whether there is a constitutional right to a jury trial pursuant to the Idaho State Constitution fail to address any issue of whether there was a right to jury trial for the specific type of action at issue in this appeal – statutory criminal forfeiture actions. To the extent that the State makes arguments about unrelated proceedings, the State's arguments are inapposite to this case. A review of pertinent case law and histories regarding the type of proceeding at issue reveal that statutory forfeiture actions very clearly were tried to juries at common law. Given this, Ms. Key had a constitutional right to a jury trial in the criminal forfeiture action in this case under the Idaho State Constitution.

With regard to her Sixth Amendment right to a jury trial, this Reply Brief is necessary to clarify that, under a proper application of the U.S. Supreme Court opinions in *Blakely* and *Apprendi*, Ms. Key likewise had a Sixth Amendment right to a jury trial. While Ms. Key acknowledges that some federal cases have reached a contrary conclusion, she submits that these opinions were *erroneously decided*.

The State has further asserted that the proportionality findings required prior to entering a forfeiture order for property are only required when the property at issue is real property because personal property such as a car is generally not divisible. This exact argument has been considered and rejected by the Idaho Supreme Court in the context of civil forfeiture proceedings, and therefore it should be rejected by this Court.

Ms. Key continues to assert that the district court's order forfeiting her vehicle violated the Eighth Amendment's prohibition against excessive fines and that the district court abused its discretion when it found that her car was used to commit or facilitate her offense. However, she will rely on the arguments contained in her Appellant's Brief in support of her contentions, and will not reiterate those arguments herein.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Ms. Key's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Are Ms. Key's claims regarding the violation of her right to a jury trial under the State and federal constitution properly justiciable as allegations of a fundamental error that is reviewable by this Court for the first time on appeal?
2. Was Ms. Key's constitutional right to a jury trial, pursuant to Article 1, § 7 of the Idaho State Constitution, violated when the issue of whether the State was entitled to forfeiture of Ms. Key's vehicle was tried before the district court judge, despite the fact that Ms. Key never waived her right to a jury determination of this issue?
3. Was Ms. Key's constitutional right to a jury trial, pursuant to the Sixth Amendment of the United States constitution, violated when the issue of whether the State was entitled to forfeiture of Ms. Key's vehicle was tried before the district court judge, despite the fact that Ms. Key never waived her right to a jury determination of this issue?
4. Did the district court err when it failed to make a determination, pursuant to I.C. § 37-2809, whether the size of the property forfeited was unfairly disproportionate to the size of the property actually used in the commission of Ms. Key's underlying offense?

ARGUMENT

I.

Ms. Key's Claims Regarding The Violation Of Her Right To A Jury Trial Under The State And Federal Constitution Are Properly Justiciable As Allegations Of A Fundamental Error That Is Reviewable By This Court For The First Time On Appeal

A. Introduction

Ms. Key's constitutional claims regarding a violation of her right to a jury trial under the State and federal constitution are properly justiciable as claims of a fundamental error based upon the violation of her fundamental constitutional rights, and these claims were never waived as part of Ms. Key's guilty plea to the underlying offense of possession of marijuana.

B. Ms. Key's Claims Regarding The Violation Of Her Right To A Jury Trial Under The State And Federal Constitution Are Properly Justiciable As Allegations Of A Fundamental Error That Is Reviewable By This Court For The First Time On Appeal

As Ms. Key noted in her Appellant's Brief, the deprivation of the right to a jury trial constitutes an error that infringes upon one of the most central of fundamental rights enjoyed by defendants. (Appellant's Brief, pp.10-11.) Indeed, the United States Supreme Court has already held that the denial of the right to jury trial is such a critical error that this deprivation can rise to the level of a structural error. See *Sullivan v. Louisiana*, 508 U.S. 275, 279-280 (1993).

While the State attempts to recast this assertion as a general claim of infirmity of the statute that purports to eliminate the right to jury trial in criminal forfeiture actions, I.C. § 37-2801(2), at base, this claim merely misapprehends or mischaracterizes the actual issue on appeal. Ms. Key's actual assertion is based upon a direct violation of

her personal constitutional rights, and is not an abstract assertion that I.C. § 37-2801(2) is unconstitutional. (Appellant's Brief, pp.9-18.) Ms. Key concedes that this statute is pertinent to the issues regarding her right to a jury trial insofar as the statute has language that there is no right to a jury trial. Because the language of this statute is germane to the issue of a right to a jury trial in criminal forfeiture proceedings, this statute was briefly noted in Ms. Key's Appellant's Brief. (Appellant's Brief, p.13.) However, regardless of the language of this statute, Ms. Key's constitutional right to a jury trial would trump any contrary language in the statute; and therefore the statutory language is in no way dispositive of the analysis and outcome in this case. See *Idaho Dep't. of Law Enforcement v. Free*, 126 Idaho 422, 427, 885 P.2d 381, 386 (1994).

Additionally, the State appears to suggest (albeit in a footnote) that Ms. Key had waived her right to a jury determination on the issue of forfeiture by virtue of entering a guilty plea as to the underlying offense. (Respondent's Brief, p.7 n.1.) This argument is contradicted by the record in this case. Under her plea agreement, Ms. Key expressly reserved the right to challenge the State's request for forfeiture of her vehicle. (R., p.81.) Therefore, Ms. Key never waived her right to any challenge regarding the issue of the forfeiture of her vehicle. Beyond this, Ms. Key was never informed that she had a separate right to a jury determination on the issue of forfeiture, and therefore this record does not show any knowing, intelligent, or voluntary waiver of her right to jury trial specifically with regard to forfeiture. See, e.g., *State v. Weber*, 140 Idaho 89, 95, 90 P.3d 314, 320 (2004).

II.

Ms. Key's Constitutional Right To A Jury Trial, Pursuant To Article 1, § 7 Of The Idaho State Constitution, Was Violated When The Issue Of Whether The State Was Entitled To Forfeiture Of Ms. Key's Vehicle Was Tried Before The District Court Judge, Despite The Fact That Ms. Key Never Waived Her Right To A Jury Determination Of This Issue

A. Introduction

The State in this case erroneously relies on precedent that is limited to sentencing proceedings in arguing that there is no right at common law to a jury determination in statutory forfeiture actions, and therefore no right to jury trial in Ms. Key's case pursuant to the Idaho State Constitution. The State's analysis, however, fails to comply with the requisite methodology for determining whether the right to a jury trial existed at common law – it is not the modern label or categorization of the action that defines whether such a right existed, but rather whether the general nature of the action was recognized in common law courts. Under a proper application of the analytical standard, and in light of pertinent case law setting forth the historical pedigree of statutory forfeiture actions, Ms. Key had a right to a jury determination of the facts necessary to support an order of criminal forfeiture pursuant to Article 1, § 7 of the Idaho State Constitution.

B. Ms. Key's Constitutional Right To A Jury Trial, Pursuant To Article 1, § 7 Of The Idaho State Constitution, Was Violated When The Issue Of Whether The State Was Entitled To Forfeiture Of Ms. Key's Vehicle Was Tried Before The District Court Judge, Despite The Fact That Ms. Key Never Waived Her Right To A Jury Determination Of This Issue

As an initial matter, at various points during the State's argument regarding Ms. Key's claims of a right to jury trial under the Idaho constitution, the State appears to invoke the standards for a right to jury trial under the Sixth Amendment of the federal

constitution. (Respondent's Brief, pp.10-13.) However, these standards are very different. The Sixth Amendment guarantee of a right to jury trial, by its terms, is limited to criminal prosecutions. U.S. Const. amend. VI. In contrast, the right to jury trial in criminal matters under the Idaho constitution is defined by whether there was a constitutional right to a jury trial for that action at common law at the time the Idaho Constitution was adopted. See *State v. Bennion*, 112 Idaho 32, 37, 730 P.2d 952, 957 (1986). This is similar to the provisions of the Seventh Amendment of the U.S. Constitution, which provides a civil right to jury trial for all actions that could have been brought in common law courts.

The Idaho constitutional standard for defining whether there is a constitutional right to a jury trial in civil or criminal actions is therefore more reflective of the federal standard for a right to jury trial in civil actions under the Seventh Amendment – it is defined by whether the nature of the action was one that could have been brought by suit at common law. *Bennion*, 112 Idaho at 37, 730 P.2d at 957; U.S. Const. amend. VII. And the U.S. Supreme Court has already recognized that statutory forfeiture actions were actions at common law to which the right to jury trial attached. *Austin v. U.S.*, 509 U.S. 602, 611-612 (1993).

Regardless of whether the forfeiture actions were deemed *in personam* (punishment against the defendant) or *in rem* (punishment of the property), forfeiture actions for property taken on land were tried in common law courts and not at equity. See *U.S. v. Bajakajian*, 524 U.S. 321, 332 n.7 (1998) (recognizing that modern criminal forfeiture statutes were “an innovative attempt to call on our common law heritage to meet an essentially modern problem”). The Oregon Supreme Court Opinion of *State v.*

1920 Studebaker Touring Car is particularly instructive for this Court on this point. See *State v. 1920 Studebaker Touring Car*, 251 P. 701 (1926).

Oregon, like Idaho, has preserved the right to jury trial under its state constitution based upon the status of the common law at the time the constitution was adopted.¹ *Id.* at 703. As noted by the court in *1920 Studebaker Touring Car*:

There can be no doubt that at the time of the adoption of our state Constitution, in cases where the seizure was made on land, property such as a "boat, vehicle or other conveyance," could not be forfeited by way of penalty or punishment for the violation of law, except in actions triable by jury. Where a proceeding is authorized which may result in a judgment that operates upon the property of the individual, either by way of forfeiture or by means of execution, the uniform rule of law has always been that, before such judgment can pass, the individual is entitled to a jury trial, unless he waives the same. We regard it equally clear that suits to enforce forfeitures or penalties have been generally tried by a jury.

Id. (internal citation omitted).

In addition, the Advisory Committee Notes to the 1972 Amendments to the Federal Rules of Criminal Procedure Rule 7 discussed the common law pedigree of criminal forfeiture actions as it related to the provision of a statutory right to jury trial in federal criminal forfeiture proceedings. The Advisory Committee noted that, "Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." See Advisory Committee Notes to the 1972 Amendments to the Federal Rules of Criminal Procedure Rule 7, F.R.Cr.P. 32.2. Additionally, the U.S. Supreme Court has recognized on numerous occasions that

¹ The Oregon constitution was adopted in 1859. See *State v. Moyer*, 200 P.3d 619, 634 (Or. Ct. App. 2009).

forfeiture upon conviction for a felony was a forfeiture action at common law. See, e.g., *Austin*, 509 U.S. at 611-612 (1993).

While modern forfeiture actions, and specifically Idaho statutory criminal forfeiture actions, are more limited in scope than their historical counterparts (in Idaho, the State may only obtain forfeiture for property actually used in the commission of the offense under I.C. § 37-2809), this does not change that the fundamental nature of the action had its roots in common law, where the right to jury trial existed. As noted by the *Bennion* Court:

The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise.

Bennion, 112 Idaho at 37, 730 P.2d at 957 (quoting *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 844 (1951)).

Contrary to the implication made by the State, the common law right to jury trial existed for both *in personam* forfeiture actions and *in rem* forfeiture actions. (See Respondent's Brief, p.12.) Because this right to jury trial has always been recognized at common law, Ms. Key had a constitutional right to a jury trial of the criminal forfeiture action in this case pursuant to Article 1, § 7 of the Idaho State Constitution.

The case of *In re Dawson*, relied on as primary authority by the State, is inapposite to the issue before this Court and does not stand for the propositions cited. In *Dawson*, the issue for the court's resolution was whether a defendant could waive the jury's determination of guilt through entering a guilty plea. *Dawson*, 20 Idaho 178, 117 P. 696, 697-700 (1911). Because the plea of guilt left no remaining triable issues for the jury, the *Dawson* Court held that a guilty plea was sufficient to constitute a conviction

even in absence of a jury determination of guilt. *Id.* The *Dawson* case does nothing to elucidate whether statutory criminal forfeiture actions were tried to juries at common law, and therefore this opinion is irrelevant to the issues in this case.

Under pertinent case law and legal authorities regarding forfeiture actions at common law, it is clear that there was a right to jury trial for both *in rem* and *in personam* forfeiture actions. The State's suggestion to the contrary is without merit.

III.

Ms. Key's Constitutional Right To A Jury Trial, Pursuant To The Sixth Amendment Of The United States Constitution, Was Violated When The Issue Of Whether The State Was Entitled To Forfeiture Of Ms. Key's Vehicle Was Tried Before The District Court, Despite The Fact That Ms. Key Never Waived Her Right To A Jury Determination Of This Issue

A. Introduction

Under the pertinent definition of what constitutes the "statutory maximum" for an offense, the holdings of *Blakely v. Washington* and *Apprendi v. New Jersey* would apply to criminal forfeiture proceedings as set forth by statute in Idaho because these proceedings require specific factual findings and further operate to increase the statutory maximum punishment that is available to the State. To the extent that other jurisdictions have found that *Blakely* and *Apprendi* do not apply to criminal forfeiture actions, those cases were erroneously decided and should be given no weight by this Court.

B. Ms. Key's Constitutional Right To A Jury Trial, Pursuant To The Sixth Amendment Of The United States Constitution, Was Violated When The Issue Of Whether The State Was Entitled To Forfeiture Of Ms. Key's Vehicle Was Tried Before The District Court, Despite The Fact That Ms. Key Never Waived Her Right To A Jury Determination Of This Issue

In response to Ms. Key's assertion that the district court violated her constitutional right to a jury trial under the Sixth Amendment of the U.S. Constitution by failing to inform Ms. Key of her right to a jury trial on the forfeiture action and failing to obtain a waiver of this right, the State has argued that there is no Sixth Amendment right to a jury trial in light of persuasive precedent. (Respondent's Brief, pp.7-10.) In making this argument, the State relies primarily of case law from federal courts that have addressed claims that are similar to that raised by Ms. Key on appeal. (Respondent's Brief, pp.7-10.) Ms. Key asserts that this Court should not rely on this precedent, as those cases are erroneously decided.

It is clear that, for purposes of the Sixth Amendment guarantee of a jury trial, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The U.S. Supreme Court has defined the term "statutory maximum" as:

... the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum sentence he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment."

Blakely, 542 U.S. at 303-304.

From the outset, it is important to note that criminal forfeiture is indisputably considered punishment. See *Libretti v. U.S.*, 516 U.S. 29, 39 (1995). It is also apparent, by their definitions, that forfeiture operates as an independent punishment than incarceration – one is a taking of liberty and one is a taking of property. Therefore, provisions that authorize forfeiture as a punishment for a criminal offense are authorizing additional punishments than mere incarceration.

Admittedly, general considerations of mitigating and aggravating evidence in indeterminate sentencing schemes do not fall within the scope of the holding of *Blakely* and *Apprendi*; largely because there is nothing that requires the district court to make these findings when imposing sentence – they are merely guidelines. See *State v. Stover*, 140 Idaho 927, 931, 104 P.3d 969, 973 (2005). In contrast, the statutory scheme that applies in Idaho with regard to criminal forfeiture actions requires very specific factual findings before the property can be deemed forfeited to the State. The district court must make a finding of the requisite nexus between the property and the criminal activity – i.e. that the property was actually used to commit or facilitate the offense – and the finding of proportionality – i.e. that the property forfeited is not unfairly disproportionate to size of the property actually used in committing the offense. See I.C. §§ 37-2801, 37-2809. Given this, the statutory framework in Idaho for criminal forfeiture does not reflect the salient features of an indeterminate sentencing scheme, and *Blakely* and *Apprendi* apply to Idaho's statutory scheme of criminal forfeiture.

The factual findings that are statutorily mandated in order to enter a criminal forfeiture in Idaho are findings that are beyond the scope of the underlying facts that support a finding of guilt of the charges offense, and these facts increase the

punishment that is otherwise available based solely upon a finding of guilt. Under the plain language of *Blakely* and *Apprendi*, a defendant has the Sixth Amendment right to a jury determination of any facts that are necessary to support criminal forfeiture.

IV.

The District Court Erred When It Failed To Make A Determination, Pursuant To I.C. § 37-2809, Whether The Size Of The Property Forfeited Was Unfairly Disproportionate To The Size Of The Property Actually Used In The Commission Of Ms. Key's Underlying Offense

A. Introduction

The State has asserted that, because Ms. Key's vehicle is personal property, and therefore not divisible, the proportionality determination mandated under I.C. § 37-2809 does not apply. This argument has been considered and rejected by the Idaho Supreme Court in *Free*, and this Court should do the same.

B. The District Court Erred When It Failed To Make A Determination, Pursuant To I.C. § 37-2809, Whether The Size Of The Property Forfeited Was Unfairly Disproportionate To The Size Of The Property Actually Used In The Commission Of Ms. Key's Underlying Offense

The State argues at length, but with no actual citation to any legal authority, that the proportionality finding required by I.C. § 37-2809 prior to the entry of a forfeiture order is not required when the property at issue is personal property because personal property is generally not divisible. As an initial matter, this Court will not consider arguments that are not supported by any legal authority. See *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). But, more important for this Court, the Idaho Supreme Court has already considered and rejected this argument in the context of civil forfeiture proceedings.

The pertinent provision of the civil forfeiture statutes, I.C. § 37-2744A, is virtually identical in substance to the criminal forfeiture proportionality statute at issue, I.C. § 37-2809. The property that was forfeited under the civil forfeiture proceedings in *Free* included the defendant's home. *Free*, 126 Idaho at 424, 885 P.2d at 383. The State argued in *Free* that the finding as to whether forfeiture was excessive, i.e. whether the property forfeited was unfairly disproportionate to the size of the property actually used in violation of the provisions, was not required because the defendant's home was not divisible property. *Id.* The *Free* Court rejected this assertion, finding that "the mere fact that the real property taken is not divisible does not preclude the possibility that the forfeiture is excessive." *Id.* at 425, 885 P.2d at 384.

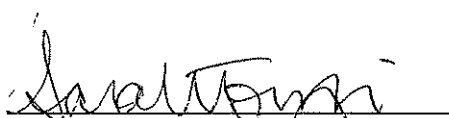
Regardless of whether the property is divisible, I.C. § 37-2809 requires the district court to determine whether the forfeiture of the property is unfairly disproportionate to the role actually played by the property in the commission of the offense.

The State also asserts that the entire vehicle was actually used in the commission of the offense because each of the parts of the car contributed to the car's overall function. (Respondent's Brief, p.16.) This argument ignores the *actus reus* of the offense actually committed. Ms. Key did not plead guilty to transportation of a controlled substance (presumably because no such charge exists), but merely pleaded guilty to possession of a controlled substance. As noted in the Appellant's Brief, Ms. Key's vehicle played a nominal and merely incidental role in this offense. (Appellant's Brief, pp.18-21.)

CONCLUSION

Ms. Key respectfully requests that this Court reverse with prejudice the district court's order granting the State's motion seeking forfeiture of her vehicle. In the alternative, she respectfully requests that this Court reverse the district court's order granting the State's motion seeking forfeiture of her vehicle and remand this case for further proceedings.

DATED this 18th day of February, 2010.

A handwritten signature in black ink, appearing to read "Sarah E. Tompkins", is written over a horizontal line.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of February, 2010, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JEFF M BRUDIE
DISTRICT COURT JUDGE
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SET/eas

